Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

88-1378
No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FRANK MCNEIL, *et al.*,
Petitioners,

v.

SPRINGFIELD PARK DISTRICT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

The Court of Appeals held that minority citizens have no right to bring a claim under the Voting Rights Act of unlawful racial discrimination stemming from the use of at-large elections when those citizens would not constitute a majority of the voting age population in any district of a remedial single-member districting plan. Thus, the court affirmed a grant of summary judgment against the black plaintiffs on the basis of a *per se* rule which says that, with anything less than 50% of the voting age population, black citizens could not elect candidates of their choice even if the at-large system were abolished. The court interpreted this Court's opinion in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to preclude consideration of any other circumstances, including the fact that black citizens in this case would constitute a majority of the total population of a single-member district, and that prior election returns indicate a consistent pattern of black victories in the precincts composing the proposed district.

The question presented is:

Whether minority citizens are precluded automatically from challenging at-large election systems under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, solely because they would not constitute a majority of the voting age population in any district of a proposed single-member districting plan, and without any consideration of other factors demonstrating a dilution of minority voting strength.

LIST OF PARTIES

The parties in this Court are as follows:

Petitioners: Frank McNeil, William H. Washington, Sr., Rudolph V. Davenport, Archie Lawrence, and Howard Veal, Sr.

Respondent: Springfield Park District.

In the court from whose judgment review is sought, the petitioners were appellants and the respondent was an appellee. The only party in the court below which is not named as a party in this Court is the Springfield School District No. 186, whose election system has been changed since the decision of the court below, and against which any dispute is now moot.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Frank McNeil, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this case on July 8, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 851 F.2d 937 (7th Cir. 1988), and is reprinted in the appendix to this petition, p. 1a. The opinion of the United States District Court for the Central District of Illinois is reported at 666 F. Supp. 1208 (C.D. Ill. 1987), and is reprinted in the appendix, p. 22a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1988, and is reprinted in the appendix, p. 34a. A timely petition for rehearing in the Court of Appeals was denied on September 21, 1988, and the order denying rehearing is reprinted in the appendix, p. 36a. On December 12, 1988, Justice Stevens entered an order extending the time for filing this petition to February 18, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of the Voting Rights Act, codified at 42 U.S.C. § 1973:

> (a) No voting qualification or prerequisite to voting, standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title (which applies the Act's protection to members of any language minority), as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance that may be considered: *Provided*, That

nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit affirming a District Court grant of summary judgment against the petitioners, five black registered voters of Springfield, Illinois, in their racial discrimination challenge to at-large elections for the seven-member board of the Springfield Park District.[1]

The class action case was filed in the United States District Court for the Central District of Illinois on January 20, 1987. The plaintiffs alleged that the at-large election system violated Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973, and invoked the District Court's jurisdiction pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1331, and 28 U.S.C. § 1343(3). The lawsuits were filed just eight days after the Chief Judge of the District Court held that at-large voting for the Springfield City Council, whose members were elected from an area which covers nearly all of the territory of the Springfield Park District, diluted black voting strength in violation of Section 2. *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. Ill.), *petition for writ of mandamus denied and appeal dismissed*, 818 F.2d 565 (7th Cir. 1987).

Historically, the Springfield Park District board has been all white, and no black citizen has ever been elected

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[1] The Court of Appeals and District Court decisions disposed in the same fashion of a consolidated case, also brought by petitioners, challenging at-large elections for the board of the Springfield School District. However, subsequent to the Court of Appeals' decision, the school district abandoned the at-large system, rendering that portion of the case moot and leaving only the park district elections at issue.

to the board. As the District Court found in the city council case, Springfield is characterized by persistent racially polarized voting in elections, 658 F. Supp. at 1029, 1033, a low electoral success rate for black candidates, *id.* at 1020-1021, 1031, vast socioeconomic disparities between the races, *id.* at 1026-1027, 1032, a history of racial discrimination and segregation, *id.* at 1026-1027, the use of large election districts for at-large voting, *id.* at 1030, and the absence of "a great deal of responsiveness to black needs on the part of the white majority." *Id.* at 1032.

After the park district case was filed, the defendant moved for summary judgment. The primary basis for the motion was that, in the event a single-member redistricting plan of seven districts were instituted, the overall black population would not be sufficiently large and geographically compact to form a voting age population majority in any of the districts, although one of the districts would be majority black in *total* population. The proposed single-member district would be approximately 50.4% black in total population and 43.7% black in voting age population. Without a 50% voting age population single-member district, contended the defendant, black voters would not have the potential to elect candidates of their choice even absent the at-large system, and therefore the at-large system does not cause any impairment of black voting strength.

Plaintiffs responded with affidavits showing that even in the absence of a black voting age population majority, black voters would be able to elect candidates of their choice in the proposed majority black total population single-member district. Appendix of Appellants in the Court of Appeals at 5, 16-17, 49-51, 67. Plaintiffs' expert witness in his affidavit analyzed a number of park board, school board, and similar elections in which black candidates, supported by the vast majority of black voters, lost due to racially polarized voting in at-large elections,

but consistently came in first *in the exact precincts* composing the proposed single-member district. *Id.* at 16-17, 49-51, 67. The analysis of the plaintiffs' expert also indicated that, while substantial racially polarized voting has existed and continues to exist in Springfield, there is a small level of white crossover voting for black candidates which exceeds black crossover voting for white candidates. This would make it possible for black voters to elect candidates of their choice with the help of white crossover voting in a single-member district *even though* the voting age population would be under 50% black. *Id.* at 5, 16-17, 22-23, 29.[2] Finally, the affidavit of plaintiffs' expert noted that candidates can win election to the Springfield park board with a plurality of the vote inasmuch as no majority vote requirement exists, *id.* at 49-54, thus enhancing the ability of black citizens to elect candidates of choice in a district under 50% black voting age population.

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[2] The polarized voting analysis in the record in the present case is comprised in part of the analysis presented in the Springfield city council case, where the District Court credited the analysis and found "marked degrees of racial polarization in Springfield's local elections" and "the existence of substantial racially polarized voting." *McNeil v. City of Springfield*, 658 F. Supp. at 1029, 1033. The fact that some small level of white crossover voting exists and may help black voters elect candidates of their choice in the single-member district does not detract from the presence of an overall pattern of racially polarized voting which would be necessary to plaintiff's proof if and when they are given a trial on the merits. According to an analysis of Springfield elections contained in the affidavit of the plaintiffs' expert, approximately 24% of the white voters voted for the black candidate. Appendix of Appellants in the Court of Appeals, at 22-23, 29. While this is enough to enable black candidates to win in the proposed single-member district, it is not enough for victory in the at-large system. Moreover, it is not enough to disprove an overall showing of polarized voting, inasmuch as this level of crossover voting is lower than that in the majority of the elections cited by this Court in *Thornburg v. Gingles*, 478 U.S. 30, 80-82 (1986), when it affirmed findings of polarized voting in North Carolina legislative elections.

However, the District Court granted the motion for summary judgment on the ground that no majority black voting age population district could be created, and failed to give any consideration to the showing of black ability to elect candidates in the proposed single-member district. *McNeil v. Springfield Park District*, 666 F. Supp. 1208 (C.D. Ill. 1987); app., p. 22a. The District Court held that summary judgment was mandated by this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and interpreted *Gingles* to prohibit an examination of any factors other than the fact that the voting age population was under 50%. 666 F. Supp. at 1212-1213; app. at 31a. Said the District Court: "At this point, it is strictly a numbers game and no other factors need be examined." *Id.* at 1212; app. at 31a.

The Court of Appeals for the Seventh Circuit affirmed. *McNeil v. Springfield Park District*, 851 F.2d 937 (7th Cir. 1988); app., p. 1a. The court noted that nothing in the legislative history of Congress' 1982 amendment to Section 2, and nothing in the pre-1980 case law which Congress codified with the 1982 amendment, suggested that a 50% voting age population single-member district minimum is necessary for a vote dilution case to survive summary judgment. *Id.* at 940-941; app. at 6a-8a. Thus, said the court, prior to the 1986 opinion in *Gingles*, summary judgment probably would have been inappropriate. "In the absence of *Gingles*, appellants might have good reason to claim that summary judgment . . . is improper . . . ." *Id.* at 941; app. at 8a.

According to the Seventh Circuit, all of that changed with *Gingles*, which the Court of Appeals said "reworked the standard" from that which Congress had incorporated into the statute with the 1982 amendment. *Id.* at 942; app. at 8a. The Seventh Circuit interpreted *Gingles*' so-called "rework[ing]" of the Section 2 standard to require an absolute 50% voting age population minimum in a proposed single-member district for any voting

rights claim to survive summary judgment. If that threshold cannot be met, said the Court of Appeals, black plaintiffs automatically lose no matter the other facts and circumstances, and no matter that black voters would be able to elect candidates of choice from the just-under 50% black voting age population district. *Id.* at 943; app. at 11a.

The Court of Appeals recognized that the irrebutable *per se* rule which it attributed to *Gingles* would foreclose potentially meritorious voting rights claims in the pursuit of judicial economy:

> In fashioning a clear regime for a prima facie Section 2 case, *Gingles* precludes some small and unconcentrated minority groups from attempting to rectify vote dilution even though they have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Id. at 942; app. at 9a. The court explained further:

> [A]lthough *in this case the Gingles criteria might conceivably foreclose a meritorious claim,* in general they will ensure that violations for which an effective remedy exists will be considered while appropriately closing the courthouse to marginal cases. In making that trade-off, the *Gingles* majority justifiably sacrificed some claims to protect stronger claims and promote judicial economy.

Id. at 942-943; app. at 10a-11a (emphasis added, footnote omitted). The Seventh Circuit concluded its opinion by stating that Gingles "cuts rough justice." *Id.* at 947; app. at 21a.

REASONS FOR GRANTING THE WRIT

In *Gingles*, this Court specifically left unresolved the important question of whether an at-large election challenge can be maintained by minority citizens who would

comprise just less than a majority of the voting age population in the most heavily concentrated minority district in a proposed single-member plan. 478 U.S. at 46-47 n.12, and 48-50; *id.* at 89-90 n.1 (O'Connor, J., concurring). As Justice O'Connor's concurrence noted, the issue was not even presented in *Gingles*. *Id.* at 89-90 n.1. By contrast, the present case presents the issue squarely.

The Seventh Circuit's holding in this case is the most prominent of an increasing number of decisions suggesting that *Gingles* has created an irrebuttable rule that minority citizens cannot challenge at-large election systems where the alternative would be single-member districts in which they would be less than 50% of the voting age population. Although *Gingles* did not decide the propriety of such a rule, much of its reasoning suggests the rule is wrong, particularly that portion of *Gingles* which states that additional factors other than voting age percentages are relevant to the determination of an ability to elect. *Id.* at 55-56. Moreover, nothing in the detailed legislative history of Congress' 1982 amendment to Section 2 mandates or even hints at such a rule, and Section 2's requirement that courts consider the "totality of circumstances" militates strongly against the type of *per se* standard the Seventh Circuit has created.

Because this issue will continue to arise in a large number of voting rights cases, and will affect minority voters in jurisdictions throughout the nation, it constitutes an important question of federal law which should be settled by this Court.

This portion of the petition will be divided into three sections. The first will review the *Gingles* opinion, showing that it left the issue unresolved, but also showing that much of its reasoning is at odds with the Seventh Circuit's decision in the present case. The second will demonstrate that the Seventh Circuit's resolution of the issue conflicts with the intent of Congress in amending Section 2 of the Voting Rights Act in 1982. The third

will discuss how the lower courts generally have interpreted *Gingles* in a way that threatens to shut the courthouse door on a large number of minority voters, and will show that this important question about the scope of the Voting Rights Act is likely to recur frequently.

I. THIS CASE PRESENTS A QUESTION OF FEDERAL LAW WHICH HAS YET TO BE RESOLVED BY THIS COURT, AND WHICH WAS SPECIFICALLY LEFT OPEN IN *THORNBURG v. GINGLES*.

In 1982, Congress amended Section 2 of the Voting Rights Act to discard any requirement of proving intent in vote dilution cases and to prohibit electoral systems that have a racially discriminatory impact. S. Rep. No. 97-417, 97th Cong., 2d Sess., at 2 (1982) (report of the Senate Judiciary Committee on the 1982 Voting Rights Act Extension), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 179 (hereinafter referred to as "Senate Report"). As amended, the statute outlaws any electoral system that results in minority citizens having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and requires courts evaluating claims to consider "the totality of circumstances." 42 U.S.C. § 1973.

The only case so far in which this Court has interpreted the amended Section 2 is *Thornburg v. Gingles*, which involved a challenge to at-large voting in various multi-member North Carolina legislative districts. In reviewing the particular claims in that case, Justice Brennan's opinion for the Court laid out the following circumstances that generally form the basis of a vote dilution challenge:

> [U]nless there is a conjunction of the following circumstances, the use of multimember districts *generally* will not impede the ability of minority voters to elect representatives of their choice. Stated suc-

> cinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group.

Id. at 48-49 (first emphasis added, second in original). The opinion then gave three reasons why those circumstances are important, and described the first reason—which is at issue in this case—as follows:

> These [aforementioned] circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following *reasons*. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates.

Id. at 50 (first emphasis added; second in original).[3]

With respect to this first reason, the opinion delineated the justification for this focus on the size and compactness of the minority population:

> Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

Id. at 50, n.17 (emphasis in original). The Court also said:

> We have no occasion to consider whether Section 2 permits, and if it does, what standards should per-

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[3] The second of the three reasons listed by the Court dealt with minority political cohesiveness and bloc voting, and the third focused on whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate. 478 U.S. at 51, 56. Neither of the latter two reasons are at issue in this appeal, inasmuch as plaintiffs have never had a trial on these matters.

> tain to, a claim brought by a minority group, which is not sufficiently large and geographically compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections.

Id. at 46-47, n.12 (emphasis in original).

Clearly, the opinion did not set out an ironclad 50% voting age population minimum for survival of any and all at-large challenges. Indeed, footnote 12 specifically left open the issue of whether a Section 2 at-large challenge can be maintained by minority voters who would comprise less than a majority in a single-member district.[4]

Moreover, at the beginning of the entire discussion of the three-step analysis, the Court stated, "unless there is a conjunction of the following cincumstances, the use of multimember districts *generally* will not impede the ability of minority voters to elect representatives of their choice." *Id.* at 48 (emphasis added). By using the qualifier "generally," the opinion obviously left open the possibility that multimember districts might, in some situations, impede minority electoral ability even without an absolute voting age majority in a potential single-member district.

In addition, the Court described the three steps of the *Gingles* analysis not as automatic prerequisites, but as "reasons" why multimember districts generally will not

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[4] Footnote 12 referred to the possibility of a claim by minority voters who contend their ability "to influence" elections has been impaired by at-large elections, as opposed to their ability "to elect" candidates of their choice. The plaintiffs in the present case contend, and the evidence demonstrates, that they can elect candidates of their choice from the proposed single-member district. Whatever nomenclature is used in such a situation, the important point is that footnote 12 left unresolved the issue of whether minority voters can proceed with a claim under Section 2 where they would be less than 50% of a proposed single-member district.

impede black voting strength unless bloc voting defeats candidates supported by a cohesive and geographically insular minority group. *Id.* at 48-50. And in the passage where the opinion did use the word "majority," it never specified that it was talking about a majority of voting age population, as opposed to total population. In the present case, black citizens would constitute a majority of the total population in the single-member district, but not of voting age population.

All of these points demonstrate that *Gingles* left open the question posed in the present case. This is all the more apparent in light of the Court's stated reason for focusing on the size and compactness of the minority group, which is that the group must show the "*potential* to elect" candidates of choice in the absence of the challenged electoral system. *Id.* at 50 n.17 (emphasis in original). As the opinion later noted, additional factors other than the black voting age population of a district are relevant to determining potential ability to elect in that district—factors such as crossover voting patterns and the presence or absence of a majority vote requirement. *Id.* at 55-56.[5] This is in line with the Court's recognition, *id.* at 45, of Congress' command to take a "functional" view of the political process in a given jurisdiction, rather than relying upon any "formalistic" concept. Senate Report at 30 n.120.[6]

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[5] The Court said that the threshold level of black voters' ability to elect representatives of their choice is dependent on the extent of bloc voting, and "will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of registered voters in the district who are members of the minority group; the size of the district; and, in multimember districts, the number of seats open and the number of candidates in the field." 478 U.S. at 56.

[6] Certainly, plaintiffs in other cases who do establish the ability to create a single-member district composed of a majority of minor-

Here is where the Seventh Circuit's minimum 50% voting age population standard is at odds with the reasoning of *Gingles*. Had the lower courts in this case taken the required "functional" view of the political process, and looked at the factors *Gingles* said are important in analyzing ability to elect, those courts would have discovered that black citizens in Springfield truly do have an ability to elect candidates of choice from the proposed district. They would have discovered election returns showing consistent black victories in the precincts comprising the proposed district. They would have discovered a small level of white crossover voting that exceeds black crossover voting and that can assist in the election of black-supported candidates in the proposed district. And they would have discovered that the absence of a majority vote requirement increases the electoral chances of black-supported candidates, even in a district just under 50% black voting age population, since a plurality is all that is necessary to win. Indeed, the absence of a majority vote requirement is one of the factors that makes the present case very different from *Gingles*, where a majority of the vote was necessary to win election in North Carolina's legislative districts. 478 U.S. at 39.

From all of this, it is very clear that the proposed district would give black voters in Springfield an opportunity to elect candidates of their choice. If plaintiffs can prove at trial that the at-large system forecloses that opportunity, then they certainly will have satisfied *Gingles*' rationale and demonstrated that the multi-

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ity citizens have demonstrated, for liability purposes under Section 2, a potential to elect and have satisfied the *Gingles* rationale. Thus, when *Gingles* spoke of a "majority" in a single-member district, it referred to the typical way to demonstrate that potential. But it is also true that the potential can exist with something less than a majority, and plaintiffs should be able to point to other electoral factors that prove the potential to elect would exist in the absence of the at-large system.

member form of the district is responsible for black voters' inability to elect candidates. 478 U.S. at 50.[7] By ignoring this rationale, by taking a formalistic rather than a functional view, and by considering no evidence concerning the factors *Gingles* identified as crucial in determining ability to elect, the Seventh Circuit's opinion—and the mechanistic rule propounded by that opinion—is at odds with much of the reasoning in *Gingles*.

In addition, the Seventh Circuit attributed to *Gingles* a desire to eliminate potentially meritorious voting rights claims in what the Court of Appeals called a "trade-off" to promote judicial economy. 851 F.2d at 942-943; app. at 10a-11a. There is simply nothing in *Gingles* to suggest such a motive on the part of this Court, and the Seventh Circuit's misreading distorts *Gingles* out of all recognition.

It is important to note that the concurring opinion of four justices in *Gingles*, authored by Justice O'Connor, expressed "no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement" for a Section 2 claim. *Id.* at 89-90 n.1 (O'Connor, J., concurring). Justice O'Connor's opinion said the issue need not be decided because "the plaintiffs in this case would

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[7] Of course, it may be that summary judgment would be appropriate against plaintiffs in some cases, where all of the relevant circumstances demonstrate that their voting strength under a potential remedial plan would be too small to make any qualitative difference in terms of their electoral abilities. In such cases, it truly could be said that the existing multimember form was not the cause of an inability to elect candidates of choice, and the rationale of *Gingles* would be met. But courts should examine that level of voting strength, and not mechanically apply a 50% voting age population figure to exclude plaintiffs on summary judgment. Where, as here, plaintiffs respond to the summary judgment motion by demonstrating that they do possess the potential to elect in the proposed district, or at least raise a genuine issue of fact on the subject, they are entitled to a trial.

meet that requirement, if indeed it exists." Justice O'Connor seemed to indicate that such a requirement should not be imposed:

> [T]he Court recognizes that when the candidates preferred by a minority group are elected in a multi-member district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members–prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

Id. (emphasis in original).

As all of the foregoing indicates, the Court's opinions in *Gingles* did not resolve the issue in the present case, and much of the reasoning in *Gingles* is contrary to the Seventh Circuit's resolution of the issue. The next subsection of this petition will demonstrate that the Seventh Circuit's resolution also conflicts with the intention of Congress in amending Section 2 in 1982.

II. THE SEVENTH CIRCUIT'S STRICT LIMITATION OF THE SCOPE OF THE VOTING RIGHTS ACT CONTRAVENES THE INTENT OF CONGRESS WHEN IT AMENDED SECTION 2 OF THE ACT IN 1982.

The absolute and mechanistic standard formulated by the Seventh Circuit is totally contrary to the intent of Congress when it passed, by an overwhelming vote, the 1982 amendment strengthening the protections of Section 2 of the Voting Rights Act. The Seventh Circuit's standard is nowhere to be found in the legislative history, is at odds with the statute's requirement that courts con-

sider the "totality of circumstances" and Congress' insistence on a "functional" view of the political process, and is absent from the pre-1980 case law which Congress codified into the amended Section 2. Each of these points will be addressed in turn and in more detail.

The legislative history of the 1982 amendment discussed in great detail the evidentiary standards that should govern the federal courts' review of vote dilution challenges to electoral systems, even to the point of listing the nine typical evidentiary factors that will be dispositive in most cases. Senate Report at 28-29. But nowhere in the legislative history is there any suggestion that a 50% voting age population minimum in a single-member district is an absolute prerequisite to a Section 2 case.

Moreover, the statute itself, as amended, requires courts to consider the "totality of circumstances." The legislative history prescribes a "functional view" of the political process as opposed to a "formalistic" view, Senate Report at 30 n.120, and requires "a searching practical evaluation of the 'past and present reality' " in the challenged jurisdiction. *Id.* at 30, *quoting White v. Regester*, 412 U.S. 755, 769-770 (1973). The Seventh Circuit's rule, by contrast, considers not the totality of the circumstances, and not the reality of electoral politics in the jurisdiction, but instead commands an unalterable and formalistic demographic standard which, if not met, automatically requires summary judgment against minority plaintiffs.

Under the Seventh Circuit's rule, courts are not entitled to consider the type of facts that exist in the present case—that the proposed single-member district is majority black in total population, that black candidates consistently win in the very precincts that would compose this single-member district, that some small level of white crossover voting may help black candidates win,

and that a plurality of the vote is all that is necessary to win election to the governmental board under challenge. The inability of courts, under the Seventh Circuit's standard, even to take these factors into account in deciding whether plaintiffs are entitled to a trial is patently inconsistent with Congress' emphasis on the totality of the circumstances and the electoral reality of the jurisdiction.

A common-sense, functional view of the issue, as Congress has prescribed, shows just how wrong the Seventh Circuit is. Minority citizens in many communities, burdened by a history of racial discrimination and by its modern manifestation, racially polarized voting, are unable to exert any political strength because they are so submerged in an at-large setting. Yet they would be much better off and could exercise some level of electoral strength when their percentage is heightened in a single-member district, even if the best possible single-member district is slightly under 50% voting age population. The Seventh Circuit rule, however, fails to take this into account, automatically consigning those minority citizens to the racially discriminatory features of at-large elections in the situations where they cannot exceed the 50% voting age population level. This hardly comports with the functional and realistic view Congress requires.

In addition, the legislative history shows that Congress specifically intended to incorporate into Section 2 the standards of vote dilution law that existed prior to 1980, standards exemplified by the analyses in *White v. Regester* and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976). Senate Report at 27-28 and n.113. As the Seventh Circuit recognized, neither *White* nor *Zimmer* mentioned any requirement similar to that which the Seventh Circuit imposed. 851 F.2d at 941. Given that the Seventh Circuit's limitation on the scope of vote dilution challenges never

existed prior to 1980, it is clear that Congress in 1982 intended no such limitation. The sole purpose of the 1982 Congressional amendment to Section 2 was to strengthen the Voting Rights Act and expand the vote dilution concept, and not to limit it in any way. *See* Senate Report at 2.

Indeed, the Seventh Circuit's opinion candidly acknowledged that summary judgment in cases like this may well be improper if only the intent of Congress is examined. 851 F.2d at 941; app. at 6a-8a. The Court of Appeals' sole basis for promulgating its rule, and limiting the scope of the Voting Rights Act, is its reliance upon what it called this Court's "rework[ing]" in *Gingles* of the Section 2 standard from that imposed by Congress. However, as demonstrated in Section I of this petition, *Gingles* does not require the unalterable standard which the Seventh Circuit attributes to it.

Having demonstrated in Section I that *Gingles* has left this issue open, and in Section II that the Seventh Circuit's resolution is inconsistent with Congressional intent, this petition will now turn to a discussion of the importance of this issue, and the frequency with which it arises in the federal courts.

III. THE QUESTION IN THIS CASE REGARDING THE SCOPE OF THE VOTING RIGHTS ACT IS AN IMPORTANT AND RECURRING ISSUE WHICH WILL AFFECT A LARGE NUMBER OF MINORITY VOTERS IN VARIOUS JURISDICTIONS THROUGHOUT THE NATION.

The Court of Appeals' decision in the present case is the most prominent of a number of recent federal court decisions interpreting *Gingles* to require a minimum 50% voting age population threshold. In addition, the issue is present and yet to be resolved in a number of pending voting rights cases. Taken together, all of these cases demonstrate that the issue is likely to recur and that the

rights of a significant number of minority voters in jurisdictions throughout the country hinge on the ultimate resolution of this question about the scope of the Voting Rights Act.

Among the growing number of federal court decisions which are in agreement with the Seventh Circuit, and which appear to require a 50% voting age population minimum in order to maintain a racial vote dilution claim under the Act, are the following: *Solomon v. Liberty County, Florida*, No. 87-3406, slip op. at 13-14 (11th Cir. Dec. 12, 1988) (holding that 50% voting age population rather than 50% total population constitutes the minimum threshold, and citing the Seventh Circuit's *McNeil* decision with approval); *McDaniels v. Mehfoud*, No. 88-0020-R, slip op. at 9 (E.D. Va. Dec. 30, 1988) (citing *McNeil* for the proposition that plaintiffs must demonstrate that they can constitute a 50% voting age population single-member district); *Armour v. State of Ohio*, No. C88-1104Y, slip op. at 5-7 (N.D. Ohio, Nov. 4, 1988), *appeal pending*, No. 88-4040 (6th Cir.) (relying on *McNeil* in holding against plaintiffs because of the absence of a 50% voting age population minimum without regard to any other electoral facts and circumstances); *Brewer v. Ham*, No. W-87-CA-015, slip op. at 6-7 (W.D. Tex. May 12, 1988), *appeal pending*, No. 88-1401 (5th Cir.) (ruling against minority plaintiffs and holding that they failed to meet the requirements of *Gingles* because—even though a 55.91% total population minority district could be created—plaintiffs did not prove that the district would exceed 50% minority in voting age population); *Williams v. State Board of Elections*, 696 F. Supp. 1563, 1566 (N.D. Ill. 1988) (granting, in part, motion to dismiss because hispanics could not form a majority in a single-member district); *Romero v. City of Pomona, California*, 665 F. Supp. 853, 858 (C.D. Cal. 1987) (denying plaintiffs' Section 2 claim and holding that black plaintiffs failed to meet the requirements of *Gingles* with a 51% total population district, while his-

panic plaintiffs failed with a 60% total population district, because the districts would be less than 50% minority when voting age population and citizenship were taken into account); *Martin v. Allain*, 658 F. Supp. 1183, 1204 (S.D. Miss. 1987) (ruling against plaintiffs, in reliance upon *Gingles*, in those multimember districts where black citizens could not constitute single-member voting age population majorities). *See also*, *McGhee v. Granville County*, 860 F.2d 110, 119 (4th Cir. 1988) (agreeing with the reasoning of the Seventh Circuit in *McNeil*, although not confronting the same issue).

Related issues have arised in some of these cases about whether *Gingles* mandates, as a minimal threshold, not only proof of a 50% voting age population, but also proof of at least 50% of the registered voters in the proposed district, and proof that minority voters can control the proposed district politically. *See Solomon v. Liberty County, Florida*, slip op. at 13-14 and n.10 (District Court ruled against black plaintiffs because blacks were only 46% of the registered voters of the proposed district, but Court of Appeals reversed because blacks were 51% of the voting age population; Court of Appeals also said that white crossover voting could give the district "an effective black majority," leaving no need to decide whether plaintiffs "must show effective control of the district or merely a mathematical majority"); *McDaniels v. Mehfoud*, slip op. at 8-9 (holding that 50% voting age population is the minimum requirement, but that plaintiffs "need not demonstrate that blacks could comprise a majority of those actually turning out to vote"). *See also*, *Romero v. City of Pomona, California*, 665 F. Supp. at 858 (hispanic plaintiffs must prove not only that they are over 50% voting age population, but also that they are over 50% voting age population in terms of born or naturalized citizens after excluding resident and undocumented aliens).

Although the Seventh Circuit's decision in the present case represents the definite trend among the courts which have confronted the issue, some disagreement does exist. *See East Jefferson Coalition v. Parish of Jefferson*, 691 F. Supp. 991, 1005-1008 (E.D. La. 1988) (a Section 2 claim may be maintained by minority citizens even if they cannot form a majority in a single-member district, so long as the district will provide them with "the ability to influence elections"). Indeed, the Seventh Circuit's decision is already the subject of scholarly criticism. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.C.L. L. Rev. 173, 206-208, 212 (1989). *See also*, Abrams, *Raising Politics Up: Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. Rev. 449, 507-508 (1988) (stating that the majority single-member district standard "has, in most cases, become a sine qua non of a Section 2 violation," and criticizing the courts' use of "this requirement as a threshold or standing inquiry").

The whole question of the threshold necessity of composing a majority voting age population in a single-member district also exists in several voting rights cases awaiting resolution in the district courts, including one case where the United States Department of Justice has brought suit claiming dilution in the districting plan for the governing board of Los Angeles County. *United States v. County of Los Angeles*, No. CV 88-5435-KN (Ex), Joint Status Report of Jan. 23, 1989 at 3-5 (C.D. Cal.) (status report states that defendant Los Angeles County intends to file a motion for summary judgment contending that a majority hispanic voting age citizen district cannot be created and relying upon the Seventh Circuit's decision in *McNeil*, and that the United States disagrees with the County's "factual and legal contentions on the issue"). *See also, Concerned Citizens of Hardee County v. Hardee County Board of Commissioners*, Nos. 86-209-CIV-T-17 and 86-1161-CIV-T-17 (M.D.

Fla. Order of Sept. 27, 1988) (defendants' motion for summary judgment on grounds of an inability to create a majority black voting age population single-member district denied in light of a factual dispute about the issue; court declines to rule on the legal question of whether such a district is necessary to maintain a Section 2 claim); *Dillard v. Crenshaw County*, No. 85-T-1332-N (M.D. Ala. Order of Sept. 7, 1987) (a number of jurisdictions in Alabama whose at-large election systems are under challenge in pending litigation contend that majority black single-member districts cannot be created and that plaintiffs' Section 2 claims are therefore without merit).

All of these cases demonstrate that the issue posed by the Seventh Circuit's decision is present in litigation involving jurisdictions in all parts of the country, from the deep south to the midwest to the west coast. The resolution of the issue will affect the voting rights of minority citizens in rural cities and counties in states like Alabama, *see Dillard v. Crenshaw County*, and in urban areas like Los Angeles. *See United States v. County of Los Angeles.* The increasing frequency of cases raising this question, and the fact that the cases include large jurisdictions such as Los Angeles County, show that the issue is not limited to a few pockets of minority voters, but is a matter that ultimately will affect a large number of black and hispanic citizens.

Moreover, the Seventh Circuit's opinion constitutes the most prominent decision on the question and is being followed and approved by a number of courts. *See McGhee v. Granville County; McDaniels v. Mehfoud; Armour v. State of Ohio.* At the same time, it is the subject of some disagreement in the lower courts and of scholarly criticism. Because of the role of the Seventh Circuit's decision in the evolution of this issue, and because of the impact of the issue on the voting rights of black and hispanic citizens in all parts of the nation, certiorari should be granted in this case.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Court of Appeals in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-2478

FRANK MCNEIL, et al., individually and
as representatives of a certified class,
Plaintiffs-Appellants,

v.

SPRINGFIELD PARK DISTRICT and
SPRINGFIELD SCHOOL DISTRICT NO. 186,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
Nos. 87 C 3016 & 87 C 3017—Richard Mills, *Judge*

ARGUED FEBRUARY 10, 1988—DECIDED JULY 8, 1988

Before CUMMINGS, CUDAHY and MANION, *Circuit Judges.*

CUDAHY, *Circuit Judge.* On January 17, 1987, the district court held that the at-large system for electing members to Springfield's city council violated section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982). *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. Ill. 1987). Plaintiffs in that case—five black registered

voters residing in Springfield—then brought this action challenging the electoral systems for the Springfield Park District and School Board.

The park district board and school board both consist of seven members who are elected at large by a plurality vote. Appendix of Appellants at 3. No black resident has ever been elected to the park board. Five blacks have been elected to the school board since 1965, filling 9.8% of the various seats available during that time. Plaintiffs claim that the multi-member voting districts dilute their voting strength,[1] impairing their ability to elect candidates of their choice, and they ask the court to divide the park and school districts into seven single-member districts, one of which would have a black majority population.[2]

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[1] "Vote dilution" refers to "the impermissible discriminatory effect that a multi-member or other districting plan has when it operates 'to cancel out or minimize the voting strength of racial groups.'" *Thornburg v. Gingles*, 106 S. Ct. 2752, 2786 (1986) (O'Connor, J., concurring in the judgment) (quoting *White v. Regester*, 412 U.S. 755, 765 (1973)).

The most commonly litigated situation leading to vote dilution is at-large districting. If voting is racially polarized, a white majority is able to consistently elect its candidates of choice, submerging the preferences of minority voters. When the district is divided into smaller single-member districts, one or more with a majority of minority group voters, the electoral results may more fully reflect societal diversity. Section 2 was intended to force modification of electoral systems evidencing historical patterns of unacceptable vote dilution.

[2] The boundaries of the school district differ slightly from the park district. According to the 1980 census, the population of the park district was 119,334, of which 11,198 (or 9.4%) were black. The population of the school district was 122,997, of which 11,217 (or 9.1%) were black. The population of appellants' proposed single-member park district would be 50.4% black, but the voting age population would be only 43.7% black, according to 1980 census figures. Similarly, while the total population of the proposed single-member school district would be 50.2% black, the voting age population would be 43.2% black.

The district court granted summary judgment for the defendants, holding that the plaintiffs failed to satisfy the "necessary preconditions" established by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986) which construed the 1982 amendments to section 2.[3] *Gingles*, like this case, involved a challenge to an at-large, or multi-member, district voting scheme. There the Court held that, in order to sustain a section 2 claim, a minority group must "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 107 S.Ct. at 2766. If it is unable to satisfy this precondition, a minority group cannot sustain its claim that the multi-member voting scheme "operates to impair minority voters' ability to elect representatives of their choice." *Id.* Applying that test in this case, the district court granted summary judgment on the ground that appellants would not comprise a voting age majority in the proposed single-member district.

Appellants attack the district court's holding on several fronts, some of which involve the merit of *Gingles* itself. Appellants primarily contend that summary judgment is inappropriate in section 2 voting rights cases, because the statute requires courts to take a "functional" view of the challenged process and evaluate the "totality of the circumstances." Appellants also contend that *Gingles*' population requirement should not apply here because that

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[3] Section 2 of the Voting Rights Act, as amended, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided by subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in

case involved a district with a majority vote requirement, while a candidate in the districts at issue here may prevail with a plurality of the vote. Alternatively, appellants maintain that, if *Gingles*' precondition warrants consideration of a motion for summary judgment, the district court erred in interpreting the precondition to require that appellants comprise a voting age majority (in contrast to a total population majority) in their proposed single-member district. Further, they argue that population growth since the 1980 census has produced a black voting age majority in the single-member district. Finally, appellants make two other arguments: first, that the court should add seats to the school and park district boards to enable blacks to comprise a voting age majority in a smaller district; second, that they should be allowed to show that the multi-member scheme impairs their ability to *influence* elections even though they cannot show that the scheme impairs their ability to *elect* candidates of their choice.

I.

Appellants' strongest argument is that summary judgment is inapproprate in section 2 cases, which generally call for substantial and complex factual determinations. This argument finds support in the text and legislative history of section 2 and in Supreme Court precedent. Indeed, both Congress and the Court have indicated that

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the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

section 2 cases require consideration of the "totality of the circumstances." *See* 42 U.S.C. § 1973(b); *Gingles*, 106 S. Ct. at 2764, 2781; *White v. Regester*, 412 U.S. 755, 769 (1973). Congress, in amending section 2, expressed its preference for "a searching practical evaluation of the 'past and present reality,'" and a "functional view of the political process." S. Rep. No. 417, 97th Cong., 2d Sess., pt. 1, at 30 & n.120 [hereinafter Report], *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 208 (quoting *White*, 412 U.S. at 769-70). Congress wanted "to restore the legal standard that governed voting rights discrimination cases prior to the Supreme Court's decision" in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which broke with precedent by requiring plaintiffs to prove discriminatory purpose to sustain their claim. Report at 16, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 192-93. The amendment to section 2 removed the intent requirement and returned to the "results" test that had been in effect before *Bolden*. 42 U.S.C. § 1973(b); *see White*, 412 U.S. at 765-66.

Prior to *Bolden*, plaintiffs could prevail by showing that a challenged election practice or procedure, under the totality of the circumstances, operated to minimize or cancel out the voting strength of a racial group. *White*, 412 U.S. at 765-66; *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). No discriminatory intent was required. Courts considered a variety of factors in appraising the impact of the challenged practice. *White*, 412 U.S. at 766-67; *Zimmer v. McKeithen*, 485 F.2d 1297, 1306-07 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam).[4]

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[4] Those factors include:

1. The extent of any history of official discrimination touching the right of minorities to register, vote, or participate in the political process;

In amending section 2, Congress instructed future courts to consider these factors in their determinations of section 2 claims. Report at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206-07. These factors help define the totality of the circumstances from which courts decide whether a particular scheme minimizes or cancels out minority voting strength. *Id.* at 29 n.118, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 207 n.118. Admittedly, factors other than those listed are probative of section 2 claims, but it may be worth noting that none of the enumerated factors describes the requirement that a minority group be sufficiently large and geographically cohesive to constitute a majority in a single-member district. Neither *White* nor *Zimmer*, the principal cases expressing the standard Congress meant to

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2. The extent to which voting in the elections is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. Whether members of the minority group have been denied access to the candidate slating process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by overt or subtle racial appeals;
7. The extent to which minorities have been elected to public office in the jurisdiction;
8. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of minorities;
9. Whether the policy underlying the state or political subdivision's voting practice or procedure is tenuous.

Report at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206-07.

codify, mentions such a requirement.[5] In the absence of

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[5] *White* involved a constitutional challenge to a multi-member district voting scheme. Plaintiff alleged that multi-member districts in Dallas and Bexar Counties, Texas, violated the fourteenth amendment's equal protection clause. In affirming the district court's judgment that the multi-member Dallas district was not equally open to participation by minority voters, the Court cited the following factors considered by the district court: the history of official racial discrimination in Texas, touching the right of blacks to register, vote and otherwise participate; the presence of a majority vote requirement for nomination; the facts that only two blacks from Dallas County had ever served in the state House of Representatives since Reconstruction, and that these two men were the only blacks ever slated to run for legislative office from Dallas County; the lack of responsiveness of elected officials to the needs of minorities in Dallas County; and the use of racial campaign tactics to defeat candidates supported by minority voters. *White*, 412 U.S. at 766-67. The Court did not discuss the size of the black voting community in Dallas County.

The *White* Court also upheld the district court's determination that the voting rights of hispanics in Bexar County had been violated. Despite comprising 29% of the county's total population of 800,000, hispanics had only been able to elect five of their own to the state House of Representatives since 1880, and just two from the largely hispanic "Barrio." *Id.* at 768. Given that the county sent twelve people to the state House of Representatives, hispanics easily could have had much greater representation in the state legislature if the county had been divided into single-member districts. Nevertheless, the Court chose not to emphasize the potential hispanic voting strength, instead opting to focus on the collateral, economic and language barriers to hispanic participation in the political process. *Id.* at 769. The Court noted that the Barrio was an area of poor housing, low income and high unemployment, and that cultural incompatability along with the poll tax and severely restrictive voter registration procedures effectively denied hispanics access to the political processes. *Id.*

In *Zimmer*, the Fifth Circuit held that an at-large voting scheme for parish school board and police jury elections impermissibly diluted minority voting strength. 485 F.2d at 1300. Although blacks comprised a majority (58.7%) of total population in the parish, the court emphasized that "access to the political process and not population was the barometer of dilution of minority voting strength." *Id.* at 1303. In reaching its decision, the court considered the *White*

Gingles, appellants might have good reason to claim that summary judgment based on minority population size and concentration is improper in section 2 cases.

Despite its merits, however, appellants' contention ultimately fails in light of *Thornburg v. Gingles*. *Gingles* involved a challenge to a multi-member district scheme for electing representatives to the North Carolina legislature. 106 S. Ct. at 2758. Registered black voters alleged that multi-member districts impaired their ability to elect representatives of their choice. *Id.* The district court applied the "totality of circumstances" test and, relying on the various factors considered in *White* and *Zimmer*, concluded that the multi-member districts violated section 2. *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984) (three judge panel), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986). After noting that blacks were "sufficient in numbers and contiguity to constitute effective voting majorities in single-member districts," *id.* at 358, the court found that North Carolina had officially discriminated against blacks with respect to their right to vote; that blacks had suffered historically from discrimination in education, housing, employment and health services; that North Carolina maintained a majority vote requirement; that white candidates had encouraged voting along color lines by appealing to racial prejudice; that very few blacks had ever held public office in the state; and that voting in the challenged districts was racially polarized. *Id.* at 359-72.

On direct appeal, the Supreme Court did not simply affirm the lower court; instead, it reworked the standard for section 2 cases. While agreeing that many or all of the *White/Zimmer* factors are relevant to a claim that

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"panoply of factors." *Id.* at 1305. The Court noted that blacks were forced to attend racially segregated schools, subjected to a literacy test to qualify to vote, and not permitted to register to vote until 1962; the Court also considered the majority vote requirement in the parish, which tended to submerge a racial minority. *Id.* at 1306.

multi-member districts violate section 2, the Court established three "necessary preconditions" that have to be met before such claims receive full consideration. *Gingles*, 106 S. Ct. at 2766. To pass the summary judgment threshold, a minority group "must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* The group must also show that it is politically cohesive and that white bloc voting usually thwarts election of the minority's preferred candidate.[6] Only upon satisfaction of these threshold criteria should a court conduct its totality-of-the-circumstances analysis and consider other relevant factors set forth in *White*. As the Court explained, "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.* at 2766-67 n.17 (emphasis in original). Thus, although a section 2 claim potentially implicates many factors, the Court stated in no uncertain terms that a challenge to a multi-member district cannot be sustained unless the *Gingles* preconditions are met. We must therefore reject appellants' contention that summary judgment is improper in section 2 cases.

At least at first glance, a tension seems to exist between the Court's approach toward voting rights claims and Congress's intent in amending section 2. The Court's preconditions are not among the *White/Zimmer* factors that Congress adopted to assist courts in their section 2 analyses. In fashioning a clear regime for a prima facie section 2 case, *Gingles* precludes some small and unconcentrated minority groups from attempting to rectify vote dilution even though they have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). For instance, minorities not large and concentrated enough to comprise a majority

[6] The latter two requirements are not at issue here.

in a single-member district and therefore unable to sustain a section 2 claim under *Gingles* may nonetheless "possess the potential" to elect candidates of their choice in a single-member district with the help of a sizeable and long-standing white cross-over vote.[7]

However, given the lack of clarity with respect to the requirements for a section 2 violation, as well as the broad latitude often granted to courts having to consider the totality of the circumstances, *Gingles* is a reasonable exercise of the Court's authority in statutory interpretation. The Court's approach, by focusing up front on whether there is an effective remedy for the claimed injury, promotes ease of application without distorting the statute or the intent underlying it. It reins in the almost unbridled discretion that section 2 gives the courts, focusing the inquiry so that plaintiffs with promising claims can develop a full record. The creation of preconditions—a choice of clear rules over muddy efforts to discern equity—shields the courts from meritless claims and ensures that clearly meritorious claims will survive summary judgment. That might not always have been true had courts been allowed to consider all of the *White/Zimmer* factors at the early stages of the proceedings. Thus, although in this case the *Gingles* criteria might conceivably foreclose a meritorious claim, in general they will ensure that violations for which an effective remedy exists will be considered while appropriately closing the courthouse to marginal cases. In making that trade-off,

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[7] Somewhat ironically, a different concern led Justice O'Connor, joined by three others, to write separately. Justice O'Connor believed that the *Gingles* criteria might make it too *easy* for plaintiffs to prevail in section 2 cases, by encouraging a failure to give adequate weight to other factors. 106 S. Ct. at 2788-89 (O'Connor, J., concurring in the judgment). She warned that the *Gingles* regime would lead courts usually to require proportional representation in contravention of clear congressional intent. *Id.*; *see also* 42 U.S.C. § 1973(b) (proviso stating the statute should not be construed to require proportional representation).

the *Gingles* majority justifiably sacrificed some claims to protect stronger claims and promote judicial economy.[8] The Voting Rights Act is a crucially important piece of national legislation, *see Derrickson v. City of Danville*, No. 87-2385, slip op. at 17-18 (April 28, 1988) (Cudahy, J., concurring), but it is subject to the same considerations of effective administration as other similar statutes.

We therefore must reject appellants' contention that a court, in considering section 2 claims, must explore the totality of the circumstances without first determining whether the *Gingles* threshold criteria are met.[9] Despite the criticisms that can be made of it, *Gingles* is a reasonable interpretation of a broadly drawn statute. The decision combines the desire of Congress to remove barriers to section 2 claims with the Court's concern that without preconditions section 2 as amended might lead to a multitude of essentially irremediable claims. In any event, we

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[8] We also note that, while *White* and *Zimmer* did not require that plaintiffs show they can constitute a majority in a single-member district, plaintiffs in both cases were apparently sufficiently populous and geographically compact to satisfy this requirement. In *White*, hispanics in Bexar County, composing 29% of the county's total population, could easily have constituted a majority in a single-member district, which, because the county had twelve representatives, would have contained roughly 8.5% of the county's total population. *See White*, 412 U.S. at 768; *see also supra* pp. 6-7 n.5. Likewise, plaintiffs in *Zimmer* would no doubt have comprised a majority in a single-member district since they already had a majority in the multi-district parish. 485 F.2d at 1301. These numbers make understandable the court's broad dicta that the size of the minority population was not "the barometer of vote dilution." *Id.* at 1303. Minority voting strength was clearly present; therefore other factors became important.

[9] Because of this holding, we do not consider plaintiffs' claim that white cross-over votes would enable black candidates to prevail in the proposed districts. Cross-over voting is to be considered only after the *Gingles* prerequisites are met. The existence of a cross-over, of course, weakens *pro tanto* the assumption of racial bloc voting.

must, of course, defer to the Court's interpretation of section 2, which leads to the conclusion that summary judgment is sometimes proper in section 2 cases.[10]

II.

Appellants contend further that *Gingles* is inapposite to this case because candidates in the elections at issue in *Gingles* needed a majority of the vote to win. *Gingles*, 106 S. Ct. at 2761. Candidates for the Springfield park district and school board need only a plurality to win if more than two candidates run. In the context of *Gingles* and a majority vote requirement, the Court's requirement that a minority group constitute a majority in a single-member district makes sense. If unable to meet this precondition, minority voters do not have the potential to elect candidates of their choice.

In the context of the case before us, however, the precondition is more troubling. The purpose of the precondition is to show that a minority group has the potential to elect its own candidates. The absence of a majority vote requirement means that when more than two candidates are running for the same seat, a minority group may be able to elect its candidate of choice without a majority of the vote. The obvious example, assuming racially polarized voting, is the situation of one minority candidate running against several white candidates. Because the white majority's votes are split, the minority candidate may be elected even though his total opposition garnered more votes.

In arguing that the *Gingles* population requirement should not apply here, appellants request that we take

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[10] Several other circuits have reached the same conclusion. *See Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1550 (11th Cir. 1987), *cert. denied sub nom. Duncan v. Carrollton*, 108 S. Ct. 1111 (1988); *Collins v. City of Norfolk*, 816 F.2d 932, 936 (4th Cir. 1987); *Buckanaga v. Sisseton Indep. School Dist., No. 54-5*, 804 F.2d 469, 472 (8th Cir. 1986).

a "functional view" of the way politics actually works in Springfield. According to their expert, many of the elections in the area field more than two candidates. Actually, appellants simply offer proof that in "over half of the seventeen Springfield area elections . . . the number of candidates was more than twice as high as the number of seats available." Brief of Appellants at 32. This argument, however, is beset with problems. To begin with, the evidence does not focus on elections for the park district and school board; it primarily concerns other elections in the area. Also, the evidence, even if probative, does not guarantee that future park district and school board elections will feature more than two candidates for a single seat. Further, when three or more candidates run for a single seat, it is quite possible that more than one candidate will be preferred by minority voters. Modifying our earlier hypothetical slightly, the minority vote may splinter when two blacks and one white vie for the same seat.

Movement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations. In our view, the Court based its bright-line requirement on a plausible scenario under which courts can estimate approximately the ability of minorities in a single-member district to elect candidates of their choice. Other scenarios are, of course, possible, but that possibility alone is not a good reason to destroy the interests in clarity and uniformity furthered by a bright-line test. No one has presented a statistical probability distribution of the variations from the *Gingles* model in Springfield Park District or School District elections but variations favoring minorities might well be offset by variations favoring whites.

To prove a section 2 violation, the potential to elect must be solid and substantial. It cannot be speculative. Blacks comprising less than a majority in a district would not necessarily have the requisite potential to elect

their candidates of choice. In the elections at issue here, even if all eligible black voters supported a single candidate in the proposed single-member district, that candidate would not be assured of electoral success. A sole challenger, supported by a bloc of white voters, would win.

As we have noted, there are many circumstances, including the existence of cross-over voting proclivities and various combinations of majority and minority candidates, that might strongly affect the electoral prospects of minority candidates. We believe, however, that the Supreme Court acted within the most obvious electoral context in promulgating the *Gingles* rule. We think the Court did not intend for the rule to be ignored or sharply modified in light of the somewhat different electoral conditions presented here. We therefore hold that the absence of a majority vote requirement here does not remove this case from the ambit of the *Gingles* requirements.

III.

Appellants next argue that they comprise a majority in a proposed single-member district. While blacks would comprise small total population majorities, with 50.4% in a single-member park district and 50.2% in a single-member school district, they would not comprise a majority of the voting age population in either single-member district.

Read literally, the *Gingles* population requirement could be construed to require that the minority group constitute a majority only of the total population in a proposed single-member district. Substantial evidence and common sense, however, dispute this construction. In explaining its requirement, the *Gingles* Court consistently refers to "minority voters," for only *voters* can demonstate the potential to elect candidates of their choice. *Gingles*, 106 S. Ct. at 2766-67 n.17. The Court also

quotes the commentators who first proposed the requirement:

> [To] demonstrate [that minority voters are injured by at-large elections], the minority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute *a majority of the voters*, whose clear electoral choices are in fact defeated by at-large voting.

Id. at 2767 n.17 (emphasis added) (quoting Blacksher & Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1, 55-56 (1982)). The threshold requirement roughly measures minority voters' potential to elect candidates of their choice. Because only minorities of voting age can affect this potential, it is logical to assume that the Court intended the majority requirement to mean a voting age majority. Viewed another way, those ineligible to vote have not experienced a dilution of their vote. They are not parties to a section 2 claim.

Moreover, courts interpreting *Gingles* have taken the threshold requirement to mean voting age majority. The district court in *Romero v. City of Pomona*, 665 F. Supp. 853, 854 (C.D. Cal. 1987), stated that "[o]nly those individuals eligible can be counted in determining whether a minority group can constitute a voting majority in a single-member district." *See also Martin v. Allain*, 658 F.Supp. 1183, 1204 (S.D. Miss. 1987). Even before *Gingles*, some courts required a showing that a minority group constituted a voting age majority in a single-member district. Thus, the district court in *Gingles*, 590 F. Supp. 345, stated in its supplemental opinion that "the vote dilution concept . . . involve[s] the impact of districting upon effective voting majorities," and that "no aggregation of less than 50% of an area's voting age

population can possibly constitute an effective voting majority." *Id.* at 381 & n.3. The court also doubted "whether the concept of racial vote dilution can . . . be applied . . . to . . . aggregations of black voters [smaller] than those sufficient to make up effective single-member district voting majorities." *Id.* at 380-81. Similarly, another district court held that Boston's districting plan did not impermissibly dilute hispanic voting strength because plaintiffs were unable to show that a district containing an hispanic voting majority could be created. *Latino Political Action Comm. v. City of Boston*, 609 F. Supp. 739 (D.C. Mass. 1985), *aff'd*, 784 F.2d 409 (1st Cir. 1986). Finally, in *Ketchum v. Byrne*, 740 F.2d 1398, 1412-13 (7th Cir. 1984), we noted that voting age population at the very least (and as augmented to reflect other factors) is an appropriate measure of potential voting strength. Plaintiffs here simply failed to meet their burden of showing such strength.

IV.

Appellants next maintain that their proposed single-member district contains a black voting age majority because of population growth since the 1980 census, which indicated a minority voting age population of roughly 43%. Appellants rely on their expert's demographic analysis estimating a minority population of 56% in the proposed district as of 1987. They support the use of these estimates through reference to dicta in *Gaffney v. Cummings*, 412 U.S. 735 (1973). The *Gaffney* Court stated the following:

> [I]t must be recognized that total population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later-adopted reapportionment plan. The United States census is more of an event than a process. It measures population at only a single instant in time. District popu-

> lations are constantly changing, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phenomena.

Id. at 746. Here the plaintiffs put their finger on a problem that applies not only to voting rights litigation but also to the fairness of presidential elections by the electoral college, districting of the House of Representatives and other political apportionment situations. With a mobile population, the demographic facts may always be a bit stale.

Nonetheless, we think there are two problems with the plaintiffs' argument. First, they never raised it in the court below. Although the plaintiffs filed an affidavit containing projections of population figures based upon past trends, they never argued the point raised here in responding to the summary judgment motion. "It is a well-settled rule that a party opposing summary judgment must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such isues on appeal." *Liberales v. County of Cook*, 709 F.2d 1122, 1126 (7th Cir. 1983). Therefore, we must consider this issue to have been waived.

Were we not to find waiver, plaintiffs would still face a tough battle. Whatever the practical merits, they base their argument on a slender legal reed: the *Gaffney* language quoted above. But that language really does not help them. It simply suggests that census data may not accurately reflect present population; it does not require courts to use a different talisman. The census is presumed accurate until proven otherwise. *Latino Political Action Comm.*, 568 F. Supp. at 1018. Proof of changed figures must be clear and convincing to override the presumption. *Dixon v. Hassler*, 412 F. Supp. 1036, 1040 (W.D. Tenn.) (three judge panel), *aff'd sub nom. Republican Party v. Dixon*, 429 U.S. 934 (1976).

Plaintiffs fail to provide any concrete evidence to rebut the presumption. In the present state of the demographic art, estimates based on past trends are generally not sufficient to override "hard" decennial census data. As the Supreme Court pointed out in *Gaffney*, 412 U.S. at 746, populations change constantly and kinks in the data are common. Perhaps in the future, there will be some shift in the decennial approach to the facts of population. But the meager evidence before us cannot override the presumption of census accuracy. In any event, if the plaintiffs' view of the population trends is correct, they will have a good claim based on the 1990 census.

V.

Appellants further argue that we should order the creation of additional seats to the park and school boards to enable black voters to satisfy the threshold requirement. Thus, instead of the seven seats mandated by state law, we would fashion eight or nine districts, one of which would be predominantly black. Although courts have broad remedial powers, plaintiffs must first show injustice. Here the purpose of the *Gingles* preconditions is to determine, as a preliminary matter, whether a multi-member district illegally dillutes minority voting strength. Since we have found that it does not, we cannot fashion a remedy. Adding seats to the boards would create a voting rights violation where none presently exists by enabling appellants to meet the necessary precondition of their section 2 claim. This is a sort of bootstrapping we cannot accept.

Appellants cite only one case that even remotely supports this argument. The Eleventh Circuit in *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), *cert. denied sub nom. Duncan v. Carrollton*, 108 S. Ct. 1111 (1988), affirmed the power of the district court to increase the number of government officials in order to give minority voters an opportunity to elect can-

didates of their choice. But the facts of *Carrollton* clearly distinguish that case from this one. In *Carrollton*, the membership of the county commission was reduced in number from five to three and later to one as the black voting age population rose to 15.3%. There was evidence that the single-member county commission had been adopted in 1947 solely in order to diffuse black voting strength. *Id.* at 1551. In our view, these unique circumstances of *Carrollton* distinguish it from the present case.

Where courts have changed the size of an elected body, they have done so with extreme caution. *See Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 199 (1972) (reversing court-mandated alteration of State Senate; change might be permissible where "*necessary* to meet *constitutional* requirements") (emphasis added). Such action upsets principles of federalism and may disrupt the operation of the affected body. *See id.* at 200 ("Size is for the State to determine . . . ."). It is not reasonable to add seats to the park and school boards essentially to *create* a section 2 violation.

VI.

Appellants finally argue that, although the application of *Gingles* may warrant summary judgment on the claim that the multi-member districts impair their ability to *elect* their preferred candidates, they can prevail on a claim that the system impairs their ability to *influence* elections. Appellants rely on a distinction made briefly by the *Gingles* majority. *See* 106 S. Ct. at 2764 n.12. The *Gingles* Court indeed divided section 2 claims into two categories. In the first, plaintiffs with a sufficiently large and compact population to constitute a majority in a single-member district would be able to allege that the multi-member district impairs their ability to elect candidates of their choice. The Court added that it was not considering whether section 2 may permit claims brought by a minority group, not sufficiently large and compact

to constitute a majority in a single-member district, that the multi-member district impairs its ability to influence elections. *Id.*

This distinction seems inconsistent with the statute's language. Section 2 states that a voting rights violation is established "if it is shown that the political processes . . . are not equally open to participation by members . . . [of a minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The essential inquiry is thus whether the political processes are equally open to participation by minority voters. It calls for only one claim.

We cannot accept the appellants' contention that they can avoid the *Gingles* criteria by arguing that the multi-member districts impair their ability to influence elections. Given the Court's decision to draw a bright line for summary judgment purposes, it seems counterproductive to permit plaintiffs who cannot satisfy the threshold *Gingles* tests to make alternative claims that would obliterate the bright line. If allowed, the "ability to influence" claim would severely undermine whatever good purpose is served by the threshold factors. *See Gingles*, 106 S. Ct. at 2787 n.1 (O'Connor, J., concurring in the judgment) (criticizing the distinction).

Courts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections. While Congress intended to make it easier for minorities to show that their vote has been diluted, it presumably did not intend to require courts to entertain claims by a tiny segment of a multi-member district's population that the group's inescapably minimal influence has been impaired by the electoral arrangements. In view of the Court's apparent objective of sharpening section

2's focus, we cannot consider claims that multi-member districts merely impair plaintiffs' ability to influence elections. Plaintiffs' ability to win elections must also be impaired.

VII.

We are trying to carry out the Supreme Court's mandate in *Thornburg v. Gingles*. Essentially the Court attempted to define a point at which an arguable voting rights deprivation becomes so marginal as to be unworthy of analysis under a "totality of the circumstances" approach. The appellants have attempted to point out imperfections in the Supreme Court's test as applied to the particular facts of this case. Concededly there are imperfections at the margins. But taken in context they are not so significant as to justify departure from the Court's threshold rule. The test cuts rough justice, a fact that becomes apparent in the contrast between plaintiffs' claim that the requirement is too strict and Justice O'Connor's claim that it is too lax. *See supra* pp. 9-10 n.7. We are, of course, bound by the Supreme Court's determination. Further, we think the rule works no injustice in the present circumstances. This is precisely the kind of case where the Court thought invocation of the Voting Rights Act would be inappropriate. Appellants cannot show that the at-large election system at issue here impairs their ability to elect candidates of their choice. We therefore affirm the district court.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 87-3016 and No. 87-3017
Consolidated

FRANK MCNEIL, WILLIAM H. WASHINGTON, SR., RUDOLPH V. DAVENPORT, ARCHIE LAWRENCE, and HOWARD VEAL, SR.,
Plaintiffs,

v.

SPRINGFIELD PARK DISTRICT and the SPRINGFIELD ELECTION COMMISSION,
Defendants,

and

FRANK MCNEIL, WILLIAM H. WASHINGTON, SR., RUDOLPH V. DAVENPORT, ARCHIE LAWRENCE, and HOWARD VEAL, SR.,
Plaintiffs,

v.

SPRINGFIELD SCHOOL DISTRICT No. 186 and the SPRINGFIELD ELECTION COMMISSION,
Defendants.

OPINION ORDER

[Entered Aug. 13, 1987]

MILLS, District Judge:

Voting Rights Act violation?

No.

Summary judgment for the School District and the Park District.

These cases have been consolidated for purposes of ruling on Defendants' motions for summary judgment. Plaintiffs' complaints challenge the method of electing park board trustees and school board members under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, asserting that the at-large election systems impair the ability of minority voters to elect representatives of their choice.

I—PROCEDURAL HISTORY

After the filing of the complaint in the park district suit, Plaintiffs moved for a preliminary injunction on March 9, 1987. On March 20, 1987, this Court held a hearing on the motion and denied the request to enjoin the upcoming elections. On April 2, 1987, we entered a written opinion fully setting out our reasons for denying injunctive relief. *McNeil v. Springfield Park District*, 656 F. Supp. 1200 (C.D. Ill. 1987).

Following the period of discovery, Defendants moved for summary judgment on June 17, 1987. Plaintiffs requested and were granted an extension of time in which to respond and filed their response on July 24, 1987. We have considered the extensive memoranda submitted by the parties along with the affidavits and other supporting materials of record. The motion is now ripe for our ruling.

The school district suit has followed approximately the same time table with the exception of the timing of the preliminary injunction motion. Plaintiffs' motion for a preliminary injunction was filed on May 19, 1987. The motion is still pending; however, our decision on the summary judgment motion moots the question of whether Plaintiffs are entitled to preliminary relief.

II—FACTS

A. *School District*

1. Present Election System

Defendant Board of Education is a seven-member body established under the School Code of the State of Illinois, Ill. Rev. Stat. ch. 122, to manage and govern the schools within District 186. Positions on the board of education are unpaid. Ill. Rev. Stat. ch. 122, ¶ 10-10 22-1 (1985).

Elections to the board are at-large and non-partisan. Ill. Rev. Stat. ch. 46, ¶ 2a-1.2(e)(1), and ch. 122, ¶¶ 10-3, 10-4 and 10-10 (1985). There are no limits to how many candidates may appear on the ballot; any adult citizen of the district who files a timely nomination petition with 50 signatures may appear on the ballot. Ill. Rev. Stat. ch. 122, ¶ 9-10 (1985). There are no primaries or majority vote requirements for elections to the school board. Ill. Rev. Stat. ch. 46, ¶ 2a-1.2(e)(1), and ch. 122, ¶¶ 10-3, 10-4, and 10-10 (1985).

Prior to 1981, members of the board served staggered 3-year terms. Ill. Rev. Stat. ch. 122, ¶¶ 10-4, 10-10 (1979). Elections were held each year in April for two or three open seats. *Id.* Because of a change in state law in 1981, board members are now elected to 4-year terms and elections are held in November of every odd-numbered year. The year 1983 was a transitional one. Ill. Rev. Stat. ch. 122, ¶¶ 10-4 and 10-10. That election involved two 2-year terms and three 4-year terms.

2. Population Data

According to the 1980 United States Census, the population of District 186 is 122,997, of which 110,485 are white (89.82%), 11,217 are black (9.1%), and 1,295 (1%) are members of other races.

Because 95.7% of all blacks who live in District 186 reside within the city of Springfield, if District 186 were to be divided into 7 single-member districts, any majority black district which might be drawn must be, for all practical purposes, within the city. The 1980 census shows that the total population of the city is 99,637, of which 87,719 are white (88%), 10,735 are black (10.77%), and 1,165 (1.17%) are members of other races. The voting age population of the city is 74,257, of which 67,178 are white (90.46%), 6,345 are black (8.54%), and 734 are members of other races (.98%).

3. The Proposed District

Generally accepted standards for redistricting require that districts should be drawn which are compact and geographically contiguous and equal in population. It is generally recognized that, where equal population districts are not drawn, any variance should be based on rational policy, such as following neighborhood lines or precinct boundaries.

With this standard in mind, the parties agree that the school district should be divided into seven districts. Accepting the facts and inferences most favorable to Plaintiffs, a single member district could be drawn which would contain a 50.2%-50.4% black majority. However, again drawing the inferences most favorable to Plaintiffs, a district cannot be drawn where blacks constitute a voting age majority. Defendants' evidence places the percentage of voting age blacks in this district at 43.2%. Plaintiffs do not refute this evidence in any of their affidavits or other submissions in the record.

B. *Park District*

The facts are virtually the same in the park district suit. The only major point of departure is an initial disagreement as to whether the park district should be di-

vided into six or seven single-member districts. Because of our ultimate disposition, we need not decide that question here. Therefore, we will assume that Plaintiffs are correct in stating that the park district should be divided into seven single member districts.

Using the seven districts as the standard, the numbers shake out roughly the same way as the school district. Blacks can maintain a 50.2% majority in a single district. Blacks cannot comprise a majority in a single district when voting age population figures are used. Defendants' figures indicate that blacks would constitute 43.7% of the proposed district when voting age population figures are used.

Plaintiffs have not refuted this evidence.

III—SUMMARY JUDGMENT STANDARD

Under Rule 56(c), summary judgment should enter "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Unquestionably, in determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Nevertheless, the rule is also well established that the mere existence of *some* factual dispute will not frustrate an otherwise proper summary judgment. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). Thus, the "preliminary question for the judge [is] not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Id.* at 2511, *quoting Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872); *see also Celotex*

Corp. v. Catrett, 106 S.Ct. 2548, 2553 (1986). In other words, the Court must consider the evidence "through the prism of the substantive evidentiary burden" in deciding Defendants' motion. *Anderson*, 106 S.Ct. at 2513; *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1976). Applying this standard, the Court now turns to the case at bar.

IV—LAW AND ANALYSIS

A.

Plaintiffs first argue that the use of summary procedures by the Court is inappropriate in the context of the complex issues raised by this voting rights litigation. For that proposition they cite *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962), where the Supreme Court observed that "[s]ummary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

Poller is correct as far as it goes; however, it has never gone so far as to create a "complexity" exception to Federal Rules 12(b)(6) and 56. *See, e.g., Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984); *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980).

The typecast of the issues raised do not necessarily determine whether summary judgment is required. As is true in any other case before us on a motion for summary judgment, the propriety of granting the motion is dependent on the interplay of the facts and law presented and the application of those facts and law to the standard enunciated in Rule 56. To treat any given case otherwise would "represent an abdication of our judicial responsibility." *Havoco*, 626 F.2d at 553.

In any event, motive and intent do not play a role in this case. The Voting Rights Act created a strictly results-based test and this case may properly be decided upon the undisputed facts before us.

B.

Although the parties have argued additional issues, the Court believes that this motion presents a single question: Can Plaintiffs bear the burden of proving that the minority group is "sufficiently large and geographically compact to constitute a majority in a single member district"? *Thornburg v. Gingles*, 106 S. Ct. 2752, 2766, 92 L. Ed. 2d 25 (1986).

The Supreme Court spoke of the above-stated quotation as one of three necessary preconditions to establishing a violation of § 2 of the Voting Rights Act. *Id.* Thus, if a class of plaintiffs fails on the proof of this condition, the defendant must prevail.

Here, Plaintiffs argue that the affidavits of their expert, Dr. Race Davies, establishes that blacks constitute a 50.2% majority in a single member district. They argue that this enables them to clear the first hurdle of *Thornburg*. We agree, as we must, on the motion for summary judgment, with Plaintiffs' evidence establishing that a single member district can be drawn containing a 50.2% black majority. This does not, however, lead us to Plaintiffs' ultimate conclusion that the first element of the *Thornburg* criteria has been met.

The reason for our disagreement is our belief that Plaintiffs have proceeded on a faulty legal premise. Plaintiffs' premise is that *Thornburg* only requires plaintiff class to demonstrate that it can constitute a bare majority in a single member district. Plaintiffs maintain that *Thornburg* should be read as requiring a simple majority based on the total population of the district. Defendants counter by arguing that the population figures

should be derived from the total voting age population as opposed to the total population. We agree with Defendants that "majority" as it is used in *Thornburg* refers to the voting age population rather than the total population.

Defendants' position is supported by three arguments. First, language in *Thornburg* itself indicates that the Court was referring to a voting age majority. Second, the district court opinion which spawned the *Thornburg* case supports the use of a voting age majority, as does additional case law. And three, a logical interpretation of the Voting Rights Act compels the use of a voting age majority to determine whether minority voters are injured as a result of the challenged voting structure.

As we noted earlier, *Thornburg* held that in order to maintain a successful challenge to an existing form of government under the Voting Rights Act a minority group must show that "it is sufficiently large and geographically compact to constitute a majority in a single member district." *Thornburg*, 106 S. Ct. at 2766. Read literally and without further elucidation, this could be construed as requiring only a population majority. Plaintiffs asks us to interpret the language in this manner. However, the Supreme Court's explanation for this threshold test calls for a different interpretation. The Supreme Court explained:

> The reason that a minority group making such a challenge must show, as a threshold matter, that is sufficiently large and geographically compact to constitute a majority in a single member district is this: unless *minority voters possess the potential to elect representatives* in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. The single-member district is generally the appropriate standard against which to measure *minority group potential to elect* because it is the smallest political unit

> from which its representatives are elected. Thus, if the minority group is spread evenly throughout a multi-member district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, *these minority voters* cannot maintain that they would have been able to elect representatives of their choice in the absence of the multi-member electoral structure. As two commentators have explained, "to demonstrate [that *minority voters* are injured by at-large elections], the *minority voters* must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting. If *minority voters*' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of the minority-supported candidates. . . . [This standard] thus would only protect racial *minority voters* from dimunition proximately caused by the districting plan; it would not assure racial minorities' proportional representation." (Emphasis ours.)

Thornburg, 106 S. Ct. at 2766-67, n.17 (*citing* Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 55-56 (1982)).

What is readily apparent from the Court's reasoning is that the threshold test focuses on minority voters' potential to elect representatives of their choice. Only those members of the minority who are eligible to vote can affect this potential to elect. It is not surprising that the Court's language frequently refers to minority voters. Hence, we believe that the Court was implicitly adopting the minority voting age population as its point

of reference. We are confident that if directly confronted with the question, the Supreme Court would acknowledge that the voting age population is the relevant figure to be used in determining if the Plaintiffs can meet the first element of *Thornburg*.

Furthermore, we do not have to look far to find an explicit adoption of voting age population as the appropriate measuring stick. In *Gingles v. Edmenstein*, the district court found that "no aggregation of less than 50% of an area's voting age population can possibly constitute an effective voting majority." 590 F. Supp. 345, 381 n.3 (E.D. N.C. 1984), *aff'd in part, rev'd in part*, sub nom, *Thornburg v. Gingles*, 106 S. Ct. 2756 (1986). The district court created a low side limit which a voting rights plainitff must overcome in order to prevail. *Id.* At this point, it is strictly a numbers game and no other factors need be examined. This of course comports with the "results" oriented approached which Congress sought to implement in the Voting Rights Act. *Thornburg*, 106 S. Ct. at 2759.

The Supreme Court did not disturb this portion of the district court's opinion and we believe implicitly adopted it. Other courts are in agreement with this conclusion. *See, e.g., Latino Political Action Committee v. City of Boston*, 609 F. Supp. 739, 747 (D. Mass. 1985), *aff'd*, 784 F.2d 409 (1st Cir. 1986); *Martin v. Allain*, Slip op. J.84-0708(b) (S.D. Miss. Apr. 1, 1987).

Finally, common sense dictates that we use the voting age population as our point of reference. When speaking of vote dilution or potential to elect representatives, you necessarily speak of voters. Those not eligible to vote do not enter into the calculation. Hence, a test which incorporates non-voters improperly skews the balance against defendants. For these reasons we find that the minority voting age population is the determining factor for purposes of deciding whether Plaintiffs meet the first pre-condition of *Thornburg*. We now turn to

the question of whether summary judgment is appropriate when utilizing the minority voting age population as the appropriate standard.

C.

Plaitiffs have brought no evidence showing that blacks would constitute a majority of the voting age population in their proposed district. Both the park district and school district have submitted affidavits that place the voting age population in Plaintiffs' proposed district below 50%. The park district's affidavits show a black voting age population of 43.7% in the proposed district. The school district's affidavits reach a result of 43.2%. At trial, Plaintiffs would bear the burden of proving that the black voting age population would be 50% or greater in their proposed district.

The burden of the moving party is to show that there is no genuine issue of material fact. The moving party may support its motion with affidavits and similar material. Fed. R. Civ. P. 56(e). If through its supporting materials the moving party has demonstrated the absence of a genuine issue of material fact, then under Rule 56(e) the burden shifts to the nonmoving party to show evidence of a genuine issue of material fact. The moving party cannot thereafter rely on its pleadings. Wright, Miller & Kane, Federal Practice & Procedure, Civil 2d, § 2739 (1983).

Here, Defendants' figures as to the voting age population have not been rebutted by any of Plaintiffs' affidavits or other supporting materials. Hence, Defendants have met their burden of showing the absence of a genuine issue of material fact.

And "the plain language of Rule 56(c) *mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an

element to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986).

Deefndants have met their burden of showing an absence of a genuine issue of material fact and Plaintiffs have failed to make a sufficient showing establishing the existence of a key element to their case on which they bear the burden of proof at trial. Therefore, summary judgment in favor of Defendants is mandated.

V. CONCLUSION

Ergo, the motions of summary judgment filed by Springfield School District No. 186 and by the Springfield Park District are ALLOWED. Judgment is entered in favor of the Defendants and against the Plaintiffs.

All other pending motions are denied as moot.

Case CLOSED.

ENTER: August 13, 1987.

FOR THE COURT:

/s/ Richard Mills
RICHARD MILLS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 8, 1988

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. RICHARD D. CUDAHY, *Circuit Judge*

HON. DANIEL A. MANION, *Circuit Judge*

No. 87-2478

FRANK MCNEIL, *et al.*, individually and as representatives of a certified class,
Plaintiffs-Appellants,

vs.

SPRINGFIELD PARK DISTRICT and
SPRINGFIELD SCHOOL DISTRICT No. 186,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division
No. 87 C 3016, 87 C 3017—RICHARD MILLS, *Judge*

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Central District of Illinois, Springfield Division, and was argued by counsel.

On consideration, whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 21, 1988

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. RICHARD D. CUDAHY, *Circuit Judge*

HON. DANIEL A. MANION, *Circuit Judge*

No. 87-2478

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v.

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ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by the plaintiffs-appellants in the above-entitled cause, no judge in regular active service requested a vote thereon and all of the members of the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and is hereby, DENIED.

Honorable Harlington Wood, Jr., did not participate in the consideration of this petition for rehearing *en banc*.